IN THE UTAH SUPREME COURT

UNIVERSITY OF UTAH, et al.,	:	
Plaintiffs/Appellees,	:	
v.	:	Case No. 20030877-SC
MARK L. SHURTLEFF,	:	
Defendant/Appellant.	:	

REPLY BRIEF OF DEFENDANT - APPELLANT

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

All such provisions are set forth verbatim in Addendum A to this brief.

SUMMARY OF ARGUMENT

The plaintiffs' claim that the University of Utah is an autonomous constitutional entity that can disregard Utah law as it relates to the government and purposes of the University is not supported by Utah law. In making this claim, plaintiffs have failed to distinguish the prior decisions of this Court which have rejected their claims of autonomy. The plaintiffs' claim that all prior decisions dealt only with fiscal matters is erroneous. Further, plaintiffs have failed to show how fiscal control under Utah's constitution is different from other forms of control.

The decisions cited from other courts do not support their claims of autonomy.

Utah's constitution does not contain a penumbral right of academic freedom and tenure. Even if it did, such a right would not grant the University of Utah the right to ignore laws enacted by the legislature.

ARGUMENT

I. UNDER UTAH LAW, THE UNIVERSITY OF UTAH IS NEITHER SELF-GOVERNING NOR AUTONOMOUS

Plaintiffs claim that the territorial laws of Utah granted autonomy to the University of Utah at the time of statehood. Appeal Brief of Appellees at 17. This is erroneous. At the time of statehood, Utah's laws expressly made the University "subject to the laws of Utah, from time to time enacted, relating to its purposes and government." 1892 Utah Laws 8. Far from granting any form of autonomy to the University, Utah's constitution simply continued the rights and privileges already provided by statute. This included the continuing requirement that the University be subject to the laws of Utah from time to time enacted concerning both its government and its purposes.

This lawsuit is not unique and it does not raise any new issue. Since statehood, the University of Utah and Utah State University have claimed autonomy based upon their reading of Utah Const. art. X, § 4. These claims have been repeatedly rejected by the courts as shown in Attorney General Shurtleff's opening brief. Brief of Defendant - Appellant at 15-19. Rather than address the decisions of this Court rejecting the autonomy they claim, the plaintiffs seek to distinguish these prior opinions by claiming that they only dealt with fiscal control and are therefore irrelevant. Appeal Brief of

Appellees at 18-19. But plaintiffs have failed to explain why fiscal control by the legislature, which they appear to accept as appropriate, is any different from other types of control. Neither the constitution nor the statutes make any distinction between fiscal and other matters.

Further, the prior decisions of this Court, rejecting the University of Utah's claims of autonomy, are not all restricted to fiscal questions as claimed by the plaintiffs. In Spence v. Utah State Agr. College, 119 Utah 104, 225 P.2d 18 (1950), this Court did not simply review the legislature's fiscal control over the state agricultural college or the University of Utah. A separate issue decided by Spence was whether the legislature had the right to alter the composition of the governing board of the state agricultural school. "Accordingly, it would require positive pronouncements in the Constitution before we would find that the members of the Constitutional Convention intended to forever close the door on the right of subsequent legislatures to increase the number of trustees." 225 P.2d at 22. This Court held that the legislature retained, both in territorial days and after statehood, the right to alter the governing body of these entities.[1]

> The constitutional article does not specifically fix the number of members, and, while the article does make mention of perpetuating the rights, franchises, immunities and endowments previously granted, its wording does not, even by implication, suggest an intent to oust the legislature from ever dealing with any affairs of the college, be the dealing favorable or prejudicial to its welfare.

---

[1] While Spence dealt with the agricultural college, now Utah State University, the applicable language of Utah Const. art. X, § 4 makes no distinction between the University of Utah and Utah State University and their rights and authority.

Id.

The various factual submissions of the plaintiffs, all of which seek to prove that the University's firearms policy is better public policy than the statutory provisions enacted by the legislature, are irrelevant and immaterial. Whether the legislature's decision concerning the University is "favorable or prejudicial to its welfare" continues to be irrelevant and immaterial. The constitution did not oust the legislature from retaining control over the question of what firearms policies should be enforced on the University of Utah's campus.

Another prior decision of this Court that dealt with matters beyond the legislature's fiscal control over the University of Utah is University of Utah v. Board of Examiners of State of Utah, 4 Utah 2d 408, 295 P.2d 348 (1956). Neither the Attorney General of Utah nor the University of Utah viewed Board of Examiners as being limited to financial matters. In the preliminary statement of his Brief of the Appellants, the Utah Attorney General explained:

> The principal issue involved in this case is the control and supervision of certain funds available for use by the University; but its implications are much broader and raise the question of whether, because of Article X, Section 4 of the Utah Constitution, the Legislative, Executive, and Judicial branches of our government can exercise any control or supervision over any activity of the University.
>
> The court below, in a judgment astounding in its scope, held that part of the authority granted the University by territorial law was perpetuated by Art. X, Sec. 4 "beyond the power of the legislature, all administrative bodies, commissions, and agencies, and officers of the State of Utah to infringe upon, curtail, abrogate, interfere with or obstruct the enjoyment of the same, or otherwise, or at all assume or exercise any jurisdiction over the affairs of the University of Utah and the powers of its Board of Regents ..."

Bd. of Exam'r, Brief of the Appellants at 2-3.[2] Far from claiming that the issue before this Court was solely fiscal, the University of Utah in its Brief of the Respondent expressly agreed with the Attorney General as to the breadth of the issue before this Court in that lawsuit.

> The Preliminary Statement in Appellant's brief states in substance the main issue involved in this case which, as implied, is not the control and supervision of certain funds available for use by the University but whether or not Article X, Section 4 of the Utah Constitution establishes the University as a constitutional corporation free from the control of the legislature, administrative bodies, commissions and agencies and officers of the State, except for the general supervision and control by the State Board of Education as provided in paragraph 10 of the Declaratory Judgment herein (R. 153) by reason of the provisions of Sections 2 and 8 of Article X of the Utah constitution.
>
> The question of control and supervision of certain funds and curtailment of powers of the University involved and herein discussed are necessarily subordinate and in most situations subject to the construction of Article X, Section 4 of our constitution.

Bd. of Exam'r, Brief of the Respondent at 1-2. Nor does this Court's opinion in Board of Examiners state that the issue being addressed was limited to financial control. To the contrary, this Court explained the great scope and breadth of the trial court's decision that it was reviewing.

> The issues were submitted to the court upon stipulations of fact, and the trial court decreed that the University is a constitutionally confirmed body corporate, perpetually vested with all the rights, immunities, franchises and endowments of the territorial institution, beyond the power of the Legislature, all administrative bodies, commissions, agencies, and officers of the State of Utah to infringe upon, curtail, abrogate, interfere with or obstruct the enjoyment of the same, or otherwise, or at all, assume,

[2] The briefs from Board of Examiners can be found in Volume 665 of Utah Briefs.

> or exercise any jurisdiction over the affairs of the University of Utah, and the powers of its Board of Regents, except for the general control and supervision conceded by the University to the State Board of Education.

Bd. of Exam'r, 295 P.2d at 350.

In claiming autonomy, the University of Utah relies on single justice concurrences to decisions of this Court, instead of considering the actual decisions of this Court. Appeal Brief of Appellees at 18. While these concurring justices talk of there being some limitations upon the legislature's ability to govern the University, that is not what the majority opinions state. In Board of Examiners this Court determined that at Utah's Constitutional Convention, "[t]he entire thought of the convention in respect to the University and Agricultural College was on the question of uniting them or leaving them separate, and on the question of location. . . . Nowhere in the proceedings can an expression of intent be found that the Legislature should forever be prohibited from acting in any matters dealing with the purposes and government of the University except its establishment and location." Id. at 368 (emphasis added). In Petty v. Utah State Board of Regents, 595 P.2d 1299, 1300-1 (Utah 1979) this Court again found that the University of Utah was subject "to the general legislative control and budgetary supervision as are other departments of state government." This Court's decisions have clearly rejected the autonomy sought for the University of Utah by the plaintiffs.

The plaintiffs have failed to provide a single decision of the courts of Utah that would support their claim. The plaintiffs do not claim for the University of Utah just a degree of autonomy in its internal operations. Instead they claim that the University's

authority is superior to that of Utah law as promulgated by the Utah State Legislature with the approval of the Governor. They ask this court to declare that the University of Utah has the power to abrogate, so far as they pertain to the University, any and all enactments of the government of the state that are contrary to the desires and beliefs of the University. The decisions of this Court have repeatedly refused to do so. Neither the laws of the territory of Utah at the time of statehood nor any pronouncement of the courts of this state have ever given this immense degree of autonomy to a state institution such as the University of Utah. Instead, the University of Utah has always been "subject to the laws of Utah, from time to time enacted, relating to its purposes and government." 1892 Utah Laws 8.

II. THE PLAINTIFFS' RELIANCE ON DECISIONS FROM THE COURTS OF OTHER STATES IS MISPLACED

Plaintiffs also rely upon decisions from the courts of other states that have granted a degree of autonomy to their state universities. Appeal Brief of Appellees at 19-20, 28. But plaintiffs fail to take into consideration the differences between Utah's constitution and the constitutions of the states upon whose courts the University relies. An example is the reliance of the University on decisions from the courts of California. This is not the first time that the University of Utah has sought to rely on California precedent. In Board of Examiners, the University relied on California decisions as well as those of Michigan, Minnesota, Colorado, Idaho and Oklahoma. In refusing to follow the precedents from these states, including California, this Court explained that:

> It may be observed that no university has been held to be freed from legislative control where the identical language contained in Article X, Section 4, Utah Constitution is found, without more. Every university which has been held to be autonomous has language in the Constitution like Idaho and Minnesota granting powers not contained in Article X, Section 4, Utah Constitution.
>
> . . .
>
> The constitutions of the states wherein said institutions are located, respecting said universities and colleges, are different in form and substance from Article X, Section 4, Utah Constitution, and each carries specific provisions granting control and management of the university to the regents or vesting the lands granted by Congress or the proceeds thereof and other donations in the university.

295 P.2d at 359.

The same defect can be found in the University's reliance on Student Government Ass'n v. Board of Supervisors, 264 So.2d 916 (La. 1972). The Louisiana Supreme Court found that Louisiana State University had a degree of autonomy based upon a 1940 amendment to that state's constitution whose very purpose was to depoliticize Louisiana's universities. Id. at 918. "It is quite clear that the purpose of this amending, in keeping with the executive recommendation, was to remove the administration of the daily affairs of the University from both the Governor and Legislature and place them under a nonpolitical board." Id. at 919. No similar intent can be found in the Utah constitution.

Rather than support the plaintiffs' argument, this Louisiana decision does the contrary. As this Court made clear in Board of Examiners, whether a particular state university was granted autonomy must be decided by considering the provisions of that particular state's constitution. Student Government reached a conclusion that Louisiana's

universities were autonomous based upon express language in Louisiana's constitution and the history of how that language came to be adopted. No similar language can be found in Utah's constitution. To the contrary, "[t]he entire thought of the convention in respect to the University and Agricultural College was on the question of uniting them or leaving them separate, and on the question of location. . . . Nowhere in the proceedings can an expression of intent be found that the Legislature should forever be prohibited from acting in any matters dealing with the purposes and government of the University except its establishment and location." Bd. of Exam'r, 295 P.2d at 368 (emphasis added).

The remaining two decisions from other states used by the University are also unavailing. Jones v. Vassar College, 299 N.Y.S.2d 283 (N.Y. Sup. Ct. 1969), a trial court decision, addresses only the power and authority of a private college. It does not address a public university's autonomy from its state's government. Nor does Nzuve v. Castleton State College, 335 A.2d 321 (Vt. 1975), address a public university's autonomy. Instead, Nzuve considered what level of due process a student was entitled to receive in a disciplinary proceeding. It did not address whether a state college or university had the autonomy to disregard state law when it established its internal policies and procedures.

Utah's constitution did not grant the University of Utah autonomy from the control of the Utah State Legislature. Decisions made under significantly different constitutional provisions are of no value in deciding the issue before this Court.

III. UTAH'S CONSTITUTION DOES NOT CONTAIN A PENUMBRAL RIGHT OF ACADEMIC FREEDOM, NOR WOULD

SUCH A RIGHT GRANT THE UNIVERSITY AUTONOMY FROM THE UTAH STATE LEGISLATURE

Plaintiffs ask this Court to create a new right to academic freedom under Utah's constitution. Plaintiffs ask that this new right be patterned after the penumbral right by the same name found in the United States Constitution. Appeal Brief of Appellees at 20-28. Such a right cannot be found in the only constitutional provision upon which the plaintiffs have relied to date. In enacting article X, § 4 of Utah's constitution, "[t]he entire thought of the convention in respect to the University and Agricultural College was on the question of uniting them or leaving them separate, and on the question of location. . . . Nowhere in the proceedings can an expression of intent be found that the Legislature should forever be prohibited from acting in any matters dealing with the purposes and government of the University except its establishment and location." Bd. of Exam'r, 295 P.2d at 368 (emphasis added). A penumbral right that would prohibit the legislature from dealing with the purposes and government of the University of Utah would be contrary to the meaning of this constitutional provision as interpreted by this Court.

Even if such a penumbral right were to be found in appropriate circumstances in Utah's declaration of rights, it would not prohibit the State of Utah's control over the University of Utah. Plaintiffs have failed to acknowledge that the federal right of academic freedom, which they ask this Court to follow, does not create any right that can be enforced by a state-created entity against the state that created it.

Plaintiffs acknowledge that the federal right of academic freedom is a penumbral right founded on the First Amendment. But the plaintiffs are the University of Utah, a state-created entity, and its president. Neither a state created agency, nor its officer, can sue the State of Utah or its Attorney General for an alleged violation of a First Amendment right made applicable to the states by the Fourteenth Amendment.

> The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned. . . . In none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state.

Trenton v. New Jersey, 262 U.S. 182, 188 (1923) (footnote omitted). Trenton involved claims by the city that the state's actions had violated both the contract clause of the federal constitution and the due process rights of the city under the Fourteenth Amendment. In Williams v. Mayor and City Council of Baltimore, 289 U.S. 36 (1933), two cities sued the receiver of a railroad on the grounds that a Maryland statute, exempting the railroad from city taxes, was invalid as a denial of equal protection under the Fourteenth Amendment and several provisions of Maryland's constitution. In rejecting the cities' federal claims, the court explained that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." 289 U.S. at 40. The same rule would apply to a claim by a state university against its state.

> It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment. . . .
>
> Despite the sweeping breadth of Justice Cardozo's language, both Williams and Trenton stand only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.

Branson Sch. Dist. v. Romer, 161 F.3d 619, 628 (10th Cir. 1998). Branson involved an attempt by a school district to sue its state's governor and other state officers for alleged violations of federal law. The Court expressly found that plaintiffs could bring their action only because their claims were **not** predicated on the Fourteenth Amendment. Id. at 629-30.

The same result was reached in Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183 (10th Cir. 1991) (state agency could not sue the state, or a city created by the state, for alleged violations of rights protected by the Fourteenth Amendment). Having determined that the Kaw Housing Authority was an agency of the state of Oklahoma, the court found that it had no rights protected under the Fourteenth Amendment.

> We focus initially on the Authority's standing to sue under section 1983. That provision was enacted to vindicate rights guaranteed under the Fourteenth Amendment, which places limitations on the states in the interest of individual rights. To have standing to sue under section 1983, therefore, the Authority must possess some right guaranteed by the Fourteenth Amendment. Thus, section 1983 does not provide any substantive rights at all but only creates a remedy for the violation of substantive rights guaranteed by the Constitution.

952 F.2d at 1187-88 (citations and footnote omitted).

Unless a state agency has expressly been authorized by the state to sue the state for alleged violations of federal constitutional rights, no such suit is permitted.

> This court in Ponca City reasoned that because "political subdivisions are creatures of the state, they possess no rights independent of those expressly provided to them by the state. Hence, unless expressly granted the ability by its creating state, a political subdivision cannot assert federal constitutional rights in opposition to state action."

Rural Water Dist. No. 1 v. City of Wilson, Kan., 243 F.3d 1263, 1274 (10th Cir. 2001).

Relying on this same line of authority, the Eleventh Circuit Court of Appeals has expressly held that a state university lacked standing to assert Fourteenth Amendment claims against its state. Knight v. State of Alabama, 14 F.3d 1534, 1555 (11th Cir. 1994) (university, as creature of the state, could not raise a Fourteenth Amendment claim under Section 1983 against the state); United States of America v. State of Alabama, 791 F.2d 1450, 1455 (11th Cir. 1986) ("ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.").

The fact that Attorney General Mark Shurtleff has been named as a defendant in this action, instead of the State of Utah, does not make a difference. In Williams, the fact that the federal court receiver and not the state was the named defendant did not alter the fact that the plaintiff cities did not have a right to challenge their parent state's conduct. In Branson, the court applied this same line of cases to an action where the defendants were state officers from whom injunctive relief was sought.

> We assume that this argument is properly presented in a case where the school districts have not sued the state of Colorado in name but rather have sued several state officials in their official capacities. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989) (holding that a suit against a state official in his representative capacity is considered a suit against the official's office, which "is no different from a suit against the State itself").

Id. at 628. The same result was reached in DeKalb County Sch. Dist. v. Schrenko, 109 F.3d 680, 688-89 (11th Cir. 1997). In DeKalb, the plaintiffs sought to circumvent the fact that the school district could not sue the state and its officers for alleged violations of Fourteenth Amendment rights by including individual school district officers and others as plaintiffs. The court rejected this attempt, finding that because the individual plaintiffs were not seeking any discrete relief, but only the same relief as the agency, that they were only nominally interested in the outcome of the action and that their claims were barred as were the district's.

In this action, a state agency and its president ask this Court to create a right under Utah's constitution that would be similar to the federal right of academic freedom. But the plaintiffs ignore the limitations on the federal right they seek to emulate. The federal right does not include autonomy such that a state agency can challenge the state's statutes that govern its conduct. Because the plaintiffs could not bring an action against the state and its officers for alleged violations of the Fourteenth Amendment, Attorney General Shurtleff urges this Court that any similar right that might be found in Utah's constitution should be similarly restricted.

Plaintiffs analogy to federal law is also flawed because rights, such as academic freedom, are private rights under the First Amendment. Government, as opposed to private expression, can control its own expression and that of its agents without violating First Amendment rights.

> The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents. Consequently, the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen.

Serra v. United States Gen. Serv. Admin., 847 F.2d 1045, 1048-49 (2nd Cir. 1988) (citations and internal quotations omitted); see also Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1038 (5th Cir. 1982) (First Amendment protects private expression, not governmental expression and nothing in the amendment precludes the government from controlling its own expression and that of its agents). When the government speaks, it can make viewpoint-based decisions, even funding decisions based upon content of speech, without violating the First Amendment. Wells v. City and County of Denver, 257 F.3d 1132, 1139 (10th Cir. 2001) (government within its rights to control content of its own speech).

The rights guaranteed by the Fourteenth Amendment are private rights. They are limitations on the states in the interest of individuals. City of Ponca City, 952 F.2d at 1188. As the United States Supreme Court stated in Williams, 289 U.S. at 40, "[a] municipal corporation, created by a state for the better ordering of government, has no

privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."

The University of Utah does not have either a First Amendment or a Fourteenth Amendment right to challenge the State of Utah's decisions as to what speech or conduct will be authorized by the State of Utah. As a state agency it cannot challenge the decision of the state to control its conduct in this manner. The same should be true of any similar right that could be found in Utah's constitution. The federal right to academic freedom was not intended as a restraint on the control that a state can exert upon its educational institutions and agencies. Any state constitutional right to academic freedom should not grant an autonomy to the University of Utah that has never existed.

CONCLUSION

For the above stated reasons, Attorney General Mark L. Shurtleff asks this Court to reverse the trial court's grant of summary judgment to the plaintiffs. Defendant urges the Court to remand this action to the trial court with instructions that it be dismissed with prejudice.

Respectfully submitted this _____ day of May, 2004.

_____

BRENT A. BURNETT
Assistant Attorney General
Attorney for Defendant - Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Reply Brief of Defendant - Appellant, postage prepaid, to each of the following on this the _____ day of May, 2004:

Alan L. Sullivan
Todd M. Shaughnessy
Amy F. Sorenson
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004

_____